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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FAUSTINO LOPEZ, Defendant and Appellant.	B213093 (Los Angeles County Super. Ct. No. TA094113)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Faustino Lopez appeals from a judgment entered after a jury convicted him of count 1, aggravated sexual assault of a child (Pen. Code, § 261, subd.(a)(1));[1] count 2, continuous sexual abuse (§ 288.5, subd. (a)); and count 3, forcible rape (§ 261, subd. (a)(2)).[2]

Appellant was sentenced to state prison for 24 years to life as follows: count 1, 15 years to life; count 2, six years to life; count 3, three years to life.

We affirm.

CONTENTIONS

Appellant contends that: (1) his right to counsel was violated when the trial court refused to allow him to discharge retained counsel after he became indigent; (2) the trial court violated his right to due process by denying his motion for new trial; (3) his right to due process and a fair trial was violated when the prosecution failed to disclose that in exchange for her testimony, B. S. was helped with her immigration problems; and (4) cumulative error requires reversal.

FACTS AND PROCEDURAL BACKGROUND

When their parents died, B. S. and her three siblings moved from Guatemala to Los Angeles to live with their aunt, Angela, and Angela's husband, appellant. In 2003, the family lived on San Pedro Street. One night, when B. S. was 10 years old, appellant removed B. S.'s panties as she slept in a bed next to Angela and appellant. When B. S. asked him what he was doing, appellant told her to shut up, covered her mouth, touched her vagina, got on top of her, pulled her towards him, then inserted his penis into her vagina as she cried and tried to push him away. The next morning, B. S. saw blood in her underwear. Appellant continued his sexual assaults on B. S.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Counts 4 through 8 were dismissed.

The family moved from the San Pedro Street house to a house on Towney Street. Between 2004 and 2007, appellant forcibly inserted his penis into B. S.'s vagina 10 or more different times at night as others slept next to them. On one occasion, appellant grabbed B. S. when she was doing her homework. She testified that he put her on the bed, pulled down her clothes, and inserted his penis "in the part where I pee from." Once, B. S.'s little brother, S.S., walked into the room after appellant had removed her clothes and taken off his pants. Appellant pulled away from her and she put her clothes back on. S.S. testified as to that same incident that he saw B. S., then appellant walk into the bedroom. When S.S. entered the bedroom, he saw appellant standing near B. S. with his penis exposed. Appellant looked startled, pulled up his pants, and asked the boy what he was doing. B. S. testified that once at the Towney Street house, appellant attempted to insert his penis into her anus which caused her to scream in pain.

The family moved to a house on Century Street in 2007. Appellant penetrated B. S.'s anus three times in the bedroom, ordering her not to say anything. On one occasion, appellant's attempt to kiss her was interrupted when B. S.'s sister entered the room. When B. S.'s sister told Angela about the incident, Angela came into the room to question B. S. but did not believe her story. She hit B. S. in the face. B. S. ran away from home for two days after Angela hit her in the face for not doing the laundry properly. She slept in an unused van that was parked in the back part of the house. On the third day, she called her married older brother, who picked her up and took her to the police station.

Although B. S. told police that the last time appellant raped her was on October 22, 2007, the forensic nurse at the Los Angeles County USC Medical Center who examined B. S. opined that she had experienced sexual penetration within one week of November 30, 2007. The nurse opined that B. S. suffered from chronic sodomy based on scars and other proof of forcible sexual anal and vaginal penetration. Social worker Elva Covarubias (Covarubias) interviewed B. S., who told her that she had been sexually

abused by appellant. Covarubias also interviewed B. S.'s siblings, who reported continuous physical abuse by Angela.

Los Angeles Police Department Officer Erik Mejia testified that on November 22, 2007, he interviewed appellant after reading him his rights. Appellant made statements as to two of the incidents reported by B. S. He stated that B. S.'s sister must have mistakenly thought he was trying to kiss B. S. because he was in close proximity to B. S. while they were painting a room. He also stated that when S.S. walked in on him and B. S., he had just come out of the shower and happened to be changing while B. S. was in the room.

Angela denied that she had ever witnessed appellant touching B. S. in a sexual way, that she took sleeping medication, or that she saw anything unusual about the bedding. She denied ever hitting B. S. Angela testified that she had slapped appellant when B. S. told her that appellant had tried to kiss her. Angela stated that B. S. had pushed her when Angela scolded her for doing the laundry incorrectly.

On April 9, 2008, the trial court conducted a hearing ostensibly pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and denied appellant's request to "name an attorney from here." Appellant was represented by retained counsel Ken Mifflin (Mifflin) at all pertinent times. On May 16, 2008, Mifflin and the prosecutor informed the trial court that they were ready for trial. Mifflin and the prosecutor again appeared before the trial court on May 19, 2008. On June 10, 2008, Mifflin rejected a plea offer of 16 years on appellant's behalf. The trial court then held another hearing characterized as a *Marsden* hearing and denied appellant's motion to discharge Mifflin. B. S. approached appellant's counsel at the probation and sentencing hearing, saying that she wanted to change her testimony. Appellant's motion to continue the sentencing hearing was granted. Appellant filed a motion for new trial on the grounds that B. S. had recanted her testimony. The trial court denied the motion for new trial.

DISCUSSION

I. The trial court did not abuse its discretion in denying appellant's motion to discharge retained counsel

Appellant contends that his motion to discharge Mifflin on April 9, 2008, was controlled by *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*) rather than *Marsden* because he sought to discharge retained rather than appointed counsel. He contends that under *Ortiz*, his Sixth Amendment right to counsel was violated. Appellant is correct that *Marsden* is not controlling. However, we conclude that the trial court did not abuse its discretion in denying appellant's motion to discharge retained counsel.

"Only retained counsel is paid by a defendant, and when substitution of *retained* counsel is sought, *Marsden* is not controlling." (*People v. Lau* (1986) 177 Cal.App.3d 473, 478.) "The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state." (*Ortiz, supra,* 51 Cal.3d at p. 983.) "A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.'" (*Ibid.*) "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (*Id.* at pp. 983, 984.) Prejudice is presumed "when an indigent criminal defendant is forced to proceed with a retained attorney whom he has consistently, and in a timely manner, sought to discharge in favor of the public defender or other court-appointed counsel." (*Id.* at p. 988.)

Ortiz recognizes that there may be risks forcing representation by coerced, unpaid counsel where both the lawyer and the defendant request the discharge of the retained

counsel. (*Ortiz, supra*, 51 Cal.3d at pp. 985–986.) In *Ortiz*, the defendant was unable to pay his counsel in full for the first trial or for the experts retained to testify at that trial. Defense counsel made repeated efforts to withdraw from the case and the defendant made repeated motions to discharge them. (*Id*. at p. 985.) The *Ortiz* court found that the trial court erred in requiring the defendant to demonstrate the incompetence of counsel, that the defendant's motion was made after the first mistrial and well before any second trial, and that the timing reflected the defendant's genuine concern about the adequacy of his offense rather than any intent to delay the trial. (*Id*. at p. 987.) The court held that discharge of defense counsel would not have interfered with the orderly processes of justice.

Here, appellant's retained counsel, Mifflin, represented appellant at his preliminary hearing on February 27, 2008, at his arraignment on March 12, 2008, and when he pled not guilty on March 18, 2008. Appellant first raised the issue of discharging Mifflin on April 9, 2008. He now contends that the trial court violated his right to counsel when it denied his motion to discharge Mifflin at the April 9, 2008, hearing. While the trial court improperly characterized the hearing as a *Marsden* hearing, we conclude that the trial court did not abuse its discretion in denying appellant's motion to discharge counsel. In contrast to *Ortiz*, where prejudice was presumed, appellant did not repeatedly seek to discharge Mifflin on the basis of indigency. Indeed, Mifflin was silent during the hearing and never attempted to withdraw from the case, unlike the defense counsel in *Ortiz*. Moreover, at the April 9, 2008, hearing, appellant never clearly stated that he wished to discharge Mifflin. *(People v. Lara* (2001) 86 Cal.App.4th 139, 158 [applying *Marsden* requirement that a duty to conduct an inquiry arises when the defendant requests discharge of retained counsel].) In response to the trial court's query of whether he had comments or specific complaints about his attorney, appellant stated "No, your Honor, just simply that I would just want you to name an attorney from here." Nor did appellant clearly articulate a desire for appointed counsel. After the trial court stated that it could "not fire this attorney unless you give me some legal reasons to do

so," appellant merely mentioned that "there's no money to pay him," and that "I don't think that he would like to work pro bono," but never unequivocally requested that his counsel be discharged. Indeed, appellant stated that other than finances, "everything is fine." Thus, the trial court's denial of appellant's "motion" was not an abuse of discretion because appellant merely seemed to express his concern that his attorney did not want to work for free.

Soon afterward, Mifflin and the prosecutor informed the trial court that they were ready for trial on May 16, 2008. Indeed, the trial court held a second *Marsden* hearing on June 10, 2008, during which appellant made no mention of indigency, or request discharge of counsel but only complained about Mifflin's failure to contact witnesses.

We conclude that the trial court did not abuse its discretion in denying appellant's April 9, 2008, motion to discharge retained counsel.

II. The trial court did not abuse its discretion in denying appellant's motion for new trial

Appellant next contends that the trial court abused its discretion in denying his motion for new trial based on B. S.'s postverdict declaration and testimony that she fabricated the charges against appellant because she thought it would assist her in being placed in another home where she would have more freedom. We disagree.

A criminal defendant may move for a new trial on specified grounds, including newly discovered evidence (§ 1181, subd. 8). (*People v. Ault* (2004) 33 Cal.4th 1250, 1260.) The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Generally, motions for new trial are looked upon with disfavor and the recantation of a witness should be given little credence. (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481.) "The role of the trial court in deciding a motion for new trial based upon a witness's recantation is to determine whether the new evidence is credible, i.e., worthy of belief by the jury. That determination is made after a consideration of all the facts

pertinent to the particular issue. The trial court is not the final arbiter of the truth or falsity of the new evidence. [¶] Once the trial court has found the recantation to be believable, it must then decide whether consideration of the recantation would render a different result on retrial reasonably probable." (*Id*. at p. 1482.)

We conclude that the trial court did not abuse its discretion in concluding that the new evidence was not credible. According to Mifflin's declaration attached to the motion for new trial, B. S., who had never before had any contact with Mifflin, approached him at the probation and sentencing hearing on July 22, 2008, and informed him that she had lied at trial and wanted to change her testimony. Mifflin then successfully moved to have the probation and sentencing hearing continued. Later, B. S. came to his office and executed a declaration exonerating appellant. B. S.'s declaration attached to the motion stated that her testimony that appellant had sexually touched her was not true and that she "said these things because [she] thought it would help [her] to be placed in [another] home where [she] would have more freedom."

However, at the hearing on the motion for new trial, it became apparent that B. S.'s recantation was fabricated. The trial court "is in the best position to determine the genuineness and effectiveness of the showing in support of the motion" based on recantation by a trial witness. (*People v. Minnick*, *supra*, 214 Cal.App.3d at p. 1481). Our review of the record comports with the trial court's findings that the circumstances surrounding B. S.'s recantation give the appearance of complicity, while her trial testimony was very credible. B. S. testified that she happened to meet her brother Angel at the bus stop where she was intending to take the bus to Mifflin's office. However, on cross-examination she testified that she did not know Mifflin's office address or what bus she had intended to take. It also strains credulity that appellant's brother, Esteban Lopez, coincidentally happened to be in Mifflin's waiting room when she arrived, as B. S. testified. Moreover, although she claimed she did not have an appointment with Mifflin, a translator was waiting for her. B. S.'s testimony that she had a boyfriend with whom she committed consensual sexual acts, but whose last name she did not know, also

seemed manufactured. Furthermore, her claim that the prosecutor had told her that she would be deported because she was lying, was undermined by her testimony on cross-examination that the prosecutor had always told her to tell the truth.

On the other hand, B. S.'s pretrial statements and testimony at trial were credible, consistent, and corroborated by both physical and testimonial evidence. Before trial, B. S. told Covarubias and police that appellant had sexually molested her. She consistently maintained at trial that appellant sexually abused her. She also testified that she hated appellant because he had ruined her life. Moreover, B. S. told the forensic nurse that appellant had molested her. At trial, the nurse opined that B. S. had been subjected to chronic and forcible anal and vaginal sex. And, S.S. corroborated one of the incidents testified to by B. S.

The trial court acted well within its discretion in determining that her subsequent recantation was not credible.

We conclude that the trial court did not abuse its discretion in denying appellant's motion for new trial.

III. The prosecutor did not commit misconduct under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*)

Appellant next contends that his right to due process and a fair trial under the Sixth and Fourteenth Amendments was violated when the prosecutor failed to disclose that Covarubias offered to help B. S. obtain a green card for her testimony against appellant. Appellant's contention is unfounded.

Under *Brady*, the prosecution must disclose material exculpatory evidence where the defendant makes a specific request, a general request, or none at all. (*In re Brown* (1998) 17 Cal.4th 873, 879.) Concomittantly, "any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution." (*Ibid.*) Whether the prosecutor succeeds or fails in meeting the obligation to learn of favorable evidence, "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (*Id*. at pp. 879–880.) Evidence is

material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7–8.)

Here, however, appellant's claim in the first place that Covarubias promised to help B. S. with her immigration problems if she testified against appellant is not supported except by B. S.'s unreliable declaration. The declaration states that when Covarubias interviewed B. S., she represented that if B. S. "continued to say that [appellant] sexually touched me that she would help me and my siblings to get our green cards." The declaration, prepared by defense counsel, contains the first suggestion of any such offer. As the trial court found, and we also concluded, however, B. S.'s posttrial declaration and testimony at the new trial motion lacked credibility. Other than that unreliable evidence, there is simply no proof that Covarubias ever made such a promise that the prosecutor should have known of and should have disclosed.

We conclude that there was no *Brady* violation. In light of our conclusions, we determine that appellant has failed to establish cumulative error. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ